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IN THE

Supreme Court of the United States

October Term, 1965

No. 171

IN THE MATTER OF THE APPLICATION

OF

THE VILLAGE OF PORT CHESTER,

Petitioner,

To Review a Determination of

M. P. CATHERWOOD, Industrial Commissioner as to Prevailing Wages of Certain Employees of the VILLAGE OF PORT CHESTER,

Respondent,

MARTIN BUCCI, JOSEPH J. GIARARDI, *et al.*,

Intervenors-Respondents.

INTERVENORS-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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INDEX

	PAGE
Introduction	1
POINT I.—Petitioner was not denied due process	2
CONCLUSION	6

CASE CITED

Cocchiorella v. Joseph, 131 N. Y. S. (2) 247, aff'd 286 A. D. 1076, 146 N. Y. S. 2d 666	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1198

In the Matter of the Application

of

THE VILLAGE OF PORT CHESTER,

Petitioner,

To Review a Determination of

M. P. CATHERWOOD, Industrial Commissioner as to Prevailing Wages of Certain Employees of the Village of Port Chester,

Respondent,

MARTIN BUCCI, JOSEPH J. GIARARDI, *et al.*,

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Introduction

Intervenors-Respondents adopt Points I and II of the opposition brief of the Respondent Catherwood, that is (1) that the Village, a municipal subdivision, may not claim Fourteenth Amendment guarantees as against the State; and that (2) no United States constitutional question was raised and decided in the State Court.

In addition Intervenors-Respondents submit that, even assuming a Federal question was raised and decided and such decision necessary to the judgment of the State Court, petitioner has not been denied due process as the record below most clearly illustrates.

POINT I

Petitioner was not denied due process.

Section 220 of the Labor Law permits municipal employees to file "prevailing wage" claims with the Comptroller in the case of Cities and with the State Industrial Commissioner in the case of Towns and Villages. There is no requirement that service of such a claim be also made on the Village. The statutory claim is not the start of a suit against the Village but only a request that the Industrial Commissioner conduct an "investigation" to determine "prevailing wages" (Pet. Br., p. 11, sec. 7).

Notice of the statutory hearings required by the statute was served on the Village which appeared and participated in the proceedings upon which record the Industrial Commissioner determined the comparable "prevailing rate" to which the Village employees were entitled.

These claimes were first filed in 1950 and the determination not rendered until October 3, 1963 (R. 44-77). Essentially the petitioner complains because the hearings were delayed and the claims continued valid. Yet the delay was caused by the petitioner. Both sides sought a settlement and each made appropriate surveys. But each time the employees urged a conclusion or a hearing petitioner would ask for a delay. At one point counsel for the Village agreed the employees figures were correct

and would recomend settlement. (R. 307, Exhibits H-1 to H-40, R. 402-451.)

Petitioner challenged the jurisdiction of the Commissioner in December, 1956, (R. 85). The Commissioner rendered a decision against him in March, 1957, (R. 35-38d) but petitioner did not challenge that decision until 1961 (R. 39-43, 45).

Petitioner asked and asked again for delay for the purpose of settlement, raised legal impediments, but avoided and delayed a Court challenge to such contentions until the last moment and generally delayed and sought to avoid a conclusion (R. 49).

Yet from this delay caused by Petitioner the Village would mount a claim of lack of due process.

It is submitted however that the window of judicial review based upon a claim of lack of due process is a small one with a clearly defined frame.

In the context of this case it may be stated:

> "The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of State regulation and control. A State may regulate the procedure of its Courts in accordance with its own conception of policy and fairness unless it offends some principal of justice ranked as fundamental such as the requirements of hearing and notice or unless it is unreasonable or arbitrary." (16 AM Jur. 2d, Sec. 549, p. 944.)

Thus was there notice and a hearing and was the proceeding generally fair?

It is undisputed that petitioner had notice of the hearing, appeared and participated. The record indicates

witnesses testified and exhibits were put in evidence. Petitioner had ample opportunity to submit evidence in support of its own position but chose not to do so.

A substantial record was made quite adequate to stand against a contention that the Commissioner was arbitrary or capricious (R. 84-457).

It is therefore submitted that there was no lack of due process.

Petitioner's brief rather suggests that it is basically quarreling with the State law and its interpretation by State Courts.

Petitioner contends in its Point I that it was denied "due process" because the Industrial Commissioner and the State Courts construed the State statute providing for hearings within six months as directory and not mandatory and that claims once filed continued "live" until the determination.

Obviously these were State questions resolved by the State in this and other cases.

See also *Cocchiorella* v. *Joseph*, 131 N. Y. S. (2) 247, aff'd 286 A. D. 1076, 146 N. Y. S. 2d 666.

Petitioner in Point II also contends a denial of due process because the complaints were not verified for each succeeding year and because of a claimed disregard of a claimed demand for a bill of particulars.

As indicated under State law a claim once filed remains "live" and there is no requirement to file a new claim each year.

It is to be remembered that the claim under the statutory scheme causes the Industrial Commissioner to conduct an investigation as to the proper wages. The pre-

vailing wage claim is not in the nature of a suit against the Village. The investigation could and did, as to some employee classifications, disclose that wages actually paid were above prevailing wages and no back wages were due. (Automotive mechanic, R. 66-68, 69.)

A supposed need for a bill of particulars is equally without merit. The claim asked for payment of comparable prevailing wages—a duty owned on its own initiative by the Village to its employees. Moreover from the beginning comparable wage data was submitted to the Village, studied by it and counsel for the Village, at record page 307, conceded it was accurate. (R. 299-314, Exhibits H-1 to H-41, R. 409-452.)

The Village in its Point III also argues a denial of due process because it claims the Village did not know about 14 new claims being filed until four years after their filing. Again the claim only asks that an investigation be made and notice to the Village is not required until the hearings. Moreover counsel for the employees testified at the hearing that the Village was in fact notified of these new claims by letter dated February 19, 1957 (R. 310, Exhibit H-35, R. 443).

As a factual matter, although not legally relevant, the Village knew about all the claims (R. 409, 310) and investigated the potential liability long before the hearing date (R. 418, 419, 423, 424).

In its Point Four petitioner argues that the Commissioner's findings were without evidence, and were mere guess work, speculation and arbitrary. Basically however, petitioner is again arguing against the Commissioners discretion, picking excerpts out of context and seeking to run to a desired conclusion.

It is submitted that this Court will not weight the evidence in such a fashion. In terms of fair play witnesses were called, testimony given, exhibits received, petitioner given the full right to cross-examine and submit its own evidence which it chose not to do. There was an abundance of evidence to support the Commissioner's conclusion.

It is submitted that this Court will search the record to see that all were given an opportunity to be heard at the hearing but this Court will not utilize its own slide-rule to see if it might or might not come to the same conclusions as the Industrial Commissioner. The proceedings were not unreasonable or arbitrary.

Petitioner really seeks a review of State law.

CONCLUSION

The petition for certiorari should be denied.

Dated: June 3, 1965.

Respectfully submitted,

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